No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director,
Department of Corrections, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Foundation
428 J Street, Suite 310
P.O. Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Treatises

Miscellaneous

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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid efficient and reliable determination of guilt and swift execution of punishment.

The present case involves an attack on habeas corpus of a conviction that was constitutional according to settled precedent at the time of the conviction. Such needless attacks on constitutionally rendered verdicts are contrary to the rights of the victims and society which the CJLF was formed to advance. In addition, the attempt to shift the focus of *Batson*-type claims to the Sixth Amendment may impair the ability of minority victims of crime to oppose racially motivated challenges by defense counsel.

SUMMARY OF FACTS AND CASE

Petitioner Frank Dean Teague, a black man, was convicted of armed robbery and attempted murder. (J.A. 15.) He was sentenced to two concurrent terms of thirty years imprisonment. *People v. Teague*, 108 Ill.App. 891, 893, 439 N.E.2d 1066, 1068 (1st Dist. 1982) *cert. denied* 464 U.S. 867 (1983).

The prosecution used its 10 peremptory challenges to excuse 10 black veniremen (J.A. 3). Defense counsel also used one of its peremptory challenges to remove from the venire a black woman who was the wife of a police officer and who had been accepted by the prosecution. (J.A. 3-4.)

The state court rejected petitioner's jury discrimination contention on direct appeal. *People v. Teague*, 108 Ill.App.3d at 891, 439 N.E.2d at 1066. A United States District Court for the Northern District of Illinois rejected petitioner's Sixth Amendment claim on habeas corpus (J.A. 5-6).

On appeal a divided panel of the Seventh Circuit accepted petitioner's Sixth Amendment contention but was

subsequently overruled by the full court sitting en banc. (J.A. 36.)

SUMMARY OF ARGUMENT

Allen v. Hardy, 478 U.S. 255 (1986) decided that *Batson v. Kentucky*, 476 U.S. 79 (1986) would not apply to cases which were final before the date of the *Batson* decision. This result was reached under the traditional *Linkletter-Stovall* approach, but the same result would follow from the Harlan-Powell approach. *Swain v. Alabama*, 380 U.S. 202 (1965) was a precedent binding on lower courts until the day *Batson* was decided. Any judgment rendered and affirmed before *Batson* in reliance on *Swain* was not in violation of the Constitution and laws of the United States, and the writ of habeas corpus does not lie to obtain relief from such a judgment.

Extension of the Sixth Amendment fair cross-section requirement to the petit jury is unnecessary, inadequate and impractical. It is unnecessary because the standing problem of *Batson* can be dealt with under *Peters v. Kiff*, 407 U.S. 493 (1972). It is inadequate because the Sixth Amendment will not protect the victim.

New rules which would not be retroactive on habeas corpus can no longer be made initially on habeas, now that the Court has accepted uniformity of application as a controlling principle in *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987).

ARGUMENT

A. *Allen v. Hardy* correctly determined the retroactivity date of *Batson* on habeas under either view of retroactivity.

1. The Two Views of Retroactivity.

In *Allen v. Hardy*, 478 U.S. 255 (1986), this Court decided that *Batson v. Kentucky*, 476 U.S. 79 (1986) would not apply to any case which had become final before the day *Batson* was decided. Petitioner, supported by amicus curiae Lawyers' Committee for Civil Rights Under Law, seeks to have *Allen* overruled to the extent it precludes application of *Batson* to cases which became final after this Court's denial of certiorari in *McCray v. New York*, 461 U.S. 961 (1983). Pet. Brief at 21-32; LCCRUL Brief at 15-24.

Petitioner and LCCRUL maintain that the result they seek will follow from the adoption by this Court in its entirety of the view of retroactivity proposed by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 258 (1969) (dissenting opinion),[1] championed in recent years by Justice Powell, *Hankerson v. North Carolina*, 432 U.S. 233, 246-48 (1979) (concurring opinion), and adopted by the Court for direct review cases only in *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987).

For the reasons we have already presented to the Court in *Dugger v. Adams*, 87-121, we agree with petitioner and LCCRUL that the Harlan-Powell view should now be

1 All citations to *Desist* and to *Mackey v. United States*, 401 U.S. 667 (1971) are to the separate opinions of Justice Harlan.

adopted in its entirety. The cogent arguments advanced by Justice White, *Shea v. Louisiana*, 470 U.S. 51, 62-64 (1985) (dissenting opinion), have lost most of their force as a result of *Griffith*. See *Griffith*, 93 L.Ed.2d at 662-63, 107 S.Ct. at 717 (Rehnquist, C. J., dissenting). It is sometimes better to give up the struggle than to see the baby divided in half. See 1 *Kings* 3:26.

Petitioner's second contention, that the Harlan-Powell view mandates retroactivity of *Batson* in this case, stands on far less solid ground. Petitioner has misread Justice Harlan and grasped at straws in a futile attempt to share in the windfall received by Batson, Griffith, and the other direct appellants.

2. The Harlan-Powell Approach.

In Justice Harlan's view, the multi-factor analysis of the *Linkletter-Stovall* approach would be replaced by only two considerations: the scope of the writ of habeas corpus and a "choice of law" inquiry. The first question is the simpler of the two. A habeas petitioner is not entitled to a de novo review of his trial under standards existing at the time of the habeas hearing. He is entitled to the writ only if he is in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254 (a). To determine whether a constitutional violation occurred at trial "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Desist*, 394 U.S. at 263.

The Harlan approach transforms the problem from one of retroactivity to one of choice of law. Just as a procedure may be legal in one jurisdiction and illegal in another, so it may be legal at one time and illegal at another. In most

cases, the doctrine of stare decisis answers the choice of law question. If a decision of this Court rendered before the state proceeding required the state court to decide differently than it did, a violation cognizable on habeas has occurred. Conversely, "the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court." 394 U.S. at 264.

There are times, however, when stare decisis does not furnish a clear answer to the question of precisely when the law actually changed. The change may be gradual rather than sharp. Between the time when a practice is clearly constitutional and the time when it is clearly unconstitutional, there may be a gray zone. Justice Harlan ventured some preliminary thoughts on this variation, and petitioner heavily relies on this discourse. Pet. Brief at 24-25. On closer examination, this reliance seems misplaced.

Justice Harlan illustrated the potential problem with the series of cases involving electronically aided eavesdropping. In *Olmstead v. United States*, 277 U.S. 438 (1928), this Court took a narrow view of what constitutes a "search." Government agents had tapped phone lines outside the defendants' homes and offices and listened to incriminating conversations. The evidence obtained was admitted over a Fourth Amendment objection.

> "The Amendment itself shows that the search is to be of material things – the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

* * *

> "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." *Id.* at 464 (italics in original).

The *Olmstead* decision rested on two alternate grounds. First, listening to conversations was deemed to be neither a "search" nor a "seizure," and, second there had been no "actual physical invasion." *Id.* at 466. In *Goldman v. United States*, 316 U.S. 129 (1942), the agents had entered an adjoining office and listened through the wall with a microphone/amplifier apparatus. The Court simply reaffirmed *Olmstead* with little discussion. *Id.* at 135-36.

Silverman v. United States, 365 U.S. 505 (1961) is the case which petitioner claims is analogous to *McCray v. New York* in the present situation. Pet. Brief at 25. *Silverman* is much more than that. In *Silverman*, government agents entered an adjoining "row house" with the consent of the owner and inserted a "spike mike" into the party wall until the probe touched a heating duct serving the suspects' house. The agents could then listen to the conversations inside the house as the sound reverberated in the heating ducts. 365 U.S. at 506-507.

The holding of *Olmstead* that eavesdropping is not a "search" was not even mentioned by the majority. The *Silverman* court distinguished *Olmstead's* "physical intrusion" holding by finding a physical intrusion in the case. The intrusion, however, was committed through the "usurpation" of the heating duct, not through a trespass as defined in the

law of property and torts. The government's argument that the local law of party-wall property rights should govern was squarely rejected. 365 U.S. at 511-12.

Even though *Silverman* did not state in words that *Goldman* or *Olmstead* was overruled, it is a decision of the Court which is clearly at odds with the principles underlying the prior decisions. When the old rule was officially pronounced dead in *Katz v. United States*, 389 U.S. 347 (1967), the *Katz* court itself declared that the old rule had been so eroded by intervening cases that it was no longer controlling. *Id.* at 353. In other words, *Katz* was merely recognizing a development which occurred some time earlier.

3. Application to the Present Case.

In order to answer Justice Harlan's "choice of law" question, one must first determine where the boundary lies. In the case of electronic eavesdropping without common law trespass, the boundary might have been *Silverman* or it might have been *Katz*. *Desist* was a direct review case, so Justice Harlan did not need to answer his hypothetical question. He merely pointed out, adopting the law student's favorite phrase, that it "could be persuasively argued" that *Silverman* was the boundary. 394 U.S. at 265. Petitioner's argument that the law must be in a state of "repose" for nonretroactivity to apply, Pet. Brief at 23, misses the entire point. If the law was different at one time than it is now, the line must be drawn somewhere. The line is not drawn where the law is in "repose" but rather at some point between the time when a lower court is obligated to follow the old rule, *Desist*, 394 U.S. at 264, and the time when it becomes obligated to follow the new one, *id.* at 265. Where the law evolves gradually through a series of

decisions, as in the electronic surveillance cases, this point may be difficult to determine with precision. Where one decision makes a "clear break," however, the determination is easy. The present case is easy.

When did the change in the law brought about by *Batson* occur? When did lower courts cease to be obligated to follow *Swain v. Alabama*, 380 U.S. 202 (1965), and when did they become obligated to inquire into the motives of peremptory challenges in a single case which appear on their face to be racially motivated? These are the questions that are properly asked if the Court adopts the Harlan approach.

Petitioner points to this Court's denial of certiorari in *McCray v. New York*, 461 U.S. 961 (1983), and claims that event to be the proper boundary for the choice of law inquiry. But what is the holding of *McCray*? The action taken by the Court, in its entirety, is "Petitions for writs of certiorari denied." How does this form a watershed in the law of peremptory challenges? Petitioner and supporting amicus count noses in the separate concurring and dissenting opinions, conclude a majority was leaning their way, and proclaim that lower courts were no longer required to follow *Swain*. Pet. Brief at 8; LCCRUL Brief at 21-23. Nose-counting is fine in parliamentary maneuvering, but this is a court of law.

Petitioner and LCCRUL fail to grasp the difference between the Court as an institution and the collection of individuals who happen to occupy the high bench at a particular moment in our nation's history. Law does not change when mortality, retirement, and the fortunes of politics happen to place on the Court five people who are inclined to vote a particular way. Law changes when the

Court as an institution *in the process of deciding a case or controversy* renders an opinion on a question of law which is both within the Court's jurisdiction and necessary to the resolution of the matter. The Court itself cannot make law in any other manner; the individuals who comprise it most certainly cannot.

Could one survey the commencement speeches delivered by the various Justices at various law schools last June, tally up a majority for a particular proposition, and declare that lower courts were no longer bound by a contrary precedent? Obviously not. Yet petitioner's argument is not much different. In our government of laws and not of people, nothing said in these separate opinions can have the slightest diluting effect on a precedent established by this Court. The precedential value of a case may be weakened or even destroyed without use of the magic word "overruled," but only the Court as an institution may do so. A lower court cannot, *Thurston Motor Lines v. Rand*, 460 U.S. 533, 535 (1983), and individual Justices cannot.

The state of peremptory challenge laws before *Batson* was vastly different than the state of electronic surveillance law before *Katz*. *Swain v. Alabama*, 380 U.S. 202 (1965) was a solid precedent established by a majority of this Court. No cases had been decided by the Court inconsistently with its principles or questioning its authority. *Swain*

was therefore binding authority on the state and lower federal courts on the federal questions resolved.[2] *Thurston*, 460 U.S. at 535. This is precisely the situation in which the state courts cannot be faulted for carrying out their duty to follow this Court's precedents. *Desist*, 394 U.S. at 264 (Harlan, J., concurring). A precedent established by this Court is *per se* the dominant federal constitutional standard unless and until a subsequent decision *of the Court* either overrules it explicitly or reaches a result contrary to its reasoning.

Any rule to the contrary would undermine the doctrine of stare decisis.

> "That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.
>
> "While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and

2 *Swain* was, of course, no barrier to the establishment of independent state restrictions on peremptory challenges. See *People v. Wheeler*, 22 Cal.3d 258, 283-87, 582 P.2d 748, 766-68 (1978). Justice Stevens recognized that on independent *state* grounds the *states* could serve as laboratories, *McCray*, 461 U.S. at 963. His opinion does not imply that state courts can disregard this Court's precedents on *federal* questions.

with facts newly ascertained.' *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Petitioner's contention that a detour from the straight path can be discerned by counting up votes in opinions concurring in and dissenting from a denial of certiorari is contrary to the entire tradition of Anglo-American jurisprudence. The contention is wholly without merit and should be emphatically rejected.

4. The "Fundamental Fairness" Exception.

Once the boundary is determined, the Harlan-Powell approach adopts a nearly *per se* rule of nonretroactivity on habeas for cases on the "old law" side of the line. There are only two exceptions. One exception occurs when this Court decides as a matter of substantive law that the conduct in question cannot constitutionally be punished as criminal. The other occurs when the procedure in question is "fundamentally unfair." Both exceptions are exceedingly rare. See *Solem v. Stumes*, 465 U.S. 638, 653, n. 4 (1984) (Powell, J., concurring in the judgment).

Amicus LCCRUL attempts to invoke the fundamental fairness exception, LCCRUL Brief at 15-18, but falls far short of the mark. This exception applies only to nonobservance of those procedures "essential to the substance of a fair hearing." *Mackey v. United States*, 401 U.S. 667 , 693 (1971) (Harlan, J., concurring and dissenting). These are the requirements so basic that they would have applied to the states under *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled *Benton v. Maryland*, 395 U.S. 784, 796 (1969),

even before the "incorporation" of the specific guarantees of the Bill of Rights. *Mackey*, 401 U.S. at 693.

Expressed another way, the "fundamental fairness" exception applies to violations which render the trial a sham. To extract a confession by torture and base a conviction on it is such a violation. See *Brown v. Mississippi*, 297 U.S. 278 (1936). A trial is fundamentally unfair when the trier of fact has a direct, personal financial interest in seeing the accused convicted. *Tumey v. Ohio*, 273 U.S. 510 (1927). So, too, in an adversary system of Byzantine procedural complexity, is it fundamentally unfair to pit a layman against an experienced trial attorney. *Gideon v. Wainwright*, 372 U.S. 335 (1963). These are all cases where reasonable people could not disagree that the defendant has been "railroaded."

Petitioner's complaint in the present case stands in sharp contrast to the fundamental fairness cases. The Illinois system provided each side with an equal number of challenges to be exercised without any restrictions at all. These challenges could be exercised not only on the basis of race but also on the basis of occupation, political beliefs and attitudes, or even an intangible discomfort with a venire member's attitude. It is highly significant that the defense, not the prosecution, removed the last black member from the venire. While petitioner now claims that an all-white jury was unfair, at the time of his trial he was more interested in getting rid of the policeman's wife. J.A. at 2-3.

The rule of *Batson* is only partially for the benefit of the defendant. A substantial component of the *Batson* rationale is the need to purge our judicial system of racism, preserve public confidence in the system, and preserve the minority jurors' right to participate in the process. *Batson*

v. Kentucky, 476 U.S. 79, 87 (1986); *id.* at 104-105 (Marshall, J., concurring). In this respect, a defendant with a *Batson* claim is in the same position as one with an exclusionary rule claim. He is the judiciary's instrument to enforce a collateral policy. The exclusionary rule has nothing whatever to do with the fairness of the trial and is generally not cognizable at all on habeas. *Stone v. Powell*, 428 U.S. 465 (1976). We would not suggest going so far with *Batson*, but the collateral policy aspect of *Batson*'s rationale weighs heavily against the "fundamental fairness" argument.

This Court has spent much of the last quarter century developing a detailed set of rules of criminal procedure from the Bill of Rights. With over a hundred volumes of United States Reports added to the shelves since this revolution began, it is highly unlikely that any rules created from this point onward will qualify for the fundamental fairness exception. In any event, LCCRUL's argument misses the mark by a country mile.

B. Extension of the Sixth Amendment fair cross-section requirement to the petit jury is unnecessary, inadequate, and impractical.

1. Necessity and Standing.

Petitioner contends that the Fourteenth Amendment basis of *Batson* precludes use of the *Batson* rule by defendants who are not members of the excluded race. Pet. Brief at 8. It is not necessarily so.

Batson held that its rule did apply where the defendant and the excluded venire member were of the same race, 476 U.S. at 96. *Batson* did not explicitly reject the possibility of extending standing to others, however. It was not

necessary in that case to decide whether a defendant could prevent peremptory challenges made against prospective jurors of a race other than his own, because both defendant and the challenged jurors were black. *Batson*, 476 U.S. at 82-83. The question of whether membership in the excluded group is required was simply not presented by the case.

In *Peters* v. *Kiff*, 407 U.S. 493 (1972) this Court allowed a white petitioner to attack the exclusion of blacks from the jury system. In *Peters*, petitioner was unable to invoke the Sixth Amendment to attack the jury discrimination because *De Stefano v. Woods*, 392 U.S. 631 (1968) had held that *Duncan v. Louisiana*, 391 U.S. 145 (1968) would not apply retroactively. *Peters*, 407 U.S. at 496 (lead opinion). In the lead opinion Justices Marshall, Douglas, and Stewart emphasized due process, finding jury discrimination to be a violation of defendant's due process rights, which have no racial requirement for standing. *Id.* at 504. This opinion also took note of the federal statutory prohibition of jury discrimination. *Id.* at 498, 505.

Another approach was taken by Justice White, concurring in the judgment, joined by Justices Brennan and Powell. The concurrence focused on this country's long standing policy against jury discrimination as demonstrated

by *Hill v. Texas*, 316 U.S. 400 (1942), an equal protection case. Like the lead opinion, Justice White also looked to a statutory manifestation of this policy, 18 U.S.C. § 243, to give Peters standing to make his claim. *Peters*, 407 U.S. at 507 (White, J. concurring). Section 243 was part of the Civil Rights Act of March 1, 1875 and makes it a crime to exclude citizens otherwise eligible for jury service for reasons of "race, color, or previous condition of servitude."[3] The concurrence decided that section 243 "reflects the central concern of the Fourteenth Amendment with racial discrimination by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him."[4] *Peters*, 407 U.S. at 507 (White, J., concurring).

Regrettably, the *Peters* case did not produce a majority opinion. Nonetheless, the result of the case on its facts establishes a precedent that a defendant does not necessarily have to be of the same race as the excluded potential jurors to have a standing in a case where the Sixth Amendment does not apply.

3 "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause shall be fined no more than $5,000." 18 U.S.C. § 243.

4 While this opinion only addresses discrimination in grand jury selection, the statute also would apply to the petit jury due to the inclusive language of the statute "grand or petit juror." 18 U.S.C. § 243.

McCleskey v. Kemp, ___ U.S. ___, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987) is another example of the relaxation of standing under the Equal Protection Clause. McCleskey, a black man convicted of killing a white police officer, challenged his sentence on equal protection grounds in two ways. First, he claimed that people who murder whites are more likely to be sentenced to death than those who murder blacks, and second, black defendants are more likely to receive the death penalty than white defendants. *McCleskey*, 95 L.Ed.2d at 277-78, 107 S.Ct. at 1766. While defendant's standing to raise his second claim was unquestionable, his standing to raise the first was more problematic. Arguably, McCleskey was attempting to defend the rights of black murder victims, but this Court has historically been reluctant to grand third party standing to constitutional litigants. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Court overcame this problem, however, by holding that McCleskey was not asserting the rights of black murder victims, but instead was attacking an "irrational exercise of governmental power" which was not necessary to accomplish a permissible government objective. *McCleskey*, 95 L.Ed.2d at 278, n. 8, 107 S.Ct. at 1766.

McCleskey demonstrates that equal protection standing is not a closed book. *McCleskey* shows the broad nature of the rights protected under the Equal Protection Clause and the interest of society in making sure that the State does not violate equal protection principles. The *McCleskey* court, like the *Peters* court, was willing to expand its conception of standing to determine whether the state has committed the grave error of protecting white victims more than black victims.

In a proper case, this Court can and should consider whether *Peters* and *McCleskey* extend *Batson* standing

beyond members of the excluded class. This is not the case. Petitioner does belong to the excluded class, and the standing question is irrelevant.

2. *Adequacy and Victims' Rights.*

Abuse of peremptory challenges is a two-way street. Racially motivated peremptory challenges made by the prosecution dominates the attention of the courts and commentators. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89, n. 12 (1986), *Swain v. Alabama*, 380 U.S. 202 (1965); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 Colum.L.Rev. 1357 (1985). Given the proper circumstances, however, the defense can also be motivated to make racially motivated peremptory challenges. Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Trials: Traditional Use or Abuse*, 14 New Eng.L.Rev. 192, 224 (1978). The problem with using the Sixth Amendment as the instrument to ban racial peremptory challenges is that it only protects the defendant in criminal matters. By its very wording it cannot restrict the actions of the defense: "In all prosecutions *the accused* shall enjoy the right to . . . an impartial jury." U.S. Const. amend. VI (italics added).

This problem was recognized by Justice Marshall in his concurrence in *Batson*. "The potential for racial prejudice, further inheres in the defendant's challenge as well." *Batson*, 476 U.S. at 108 (Marshall, J., concurring). If defendant is accused of committing a racially motivated crime, counsel could consider it important to peremptorally challenge every venire member who is of the same race as the victim. One example is the racially charged "Howard Beach" case. In this case, four white teen-agers were charged with the killing of a black man in the Queens, New York neighbor-

hood of Howard Beach. The trial court, in response to the prosecutor's contention that the defense had used peremptory challenges to exclude three prospective jurors because they were black, found that the defense had made peremptory challenges on the sole ground of group bias. In response to the prosecution's challenges, the trial court promised to limit defendant's future use of peremptory challenges, citing *Batson*. 18 Criminal Justice Newsletter Oct. 1, 1987 at 6-7.

A chilling example of the defense use of peremptory challenges is the case of Arthur McDuffie. McDuffie was a thirty-three-year-old black insurance salesman with no prior criminal record who died from head injuries received from the police while being arrested for running a red light. P. Di Perna, *Juries on Trial: Face of American Justice* 179 (1984). The defense used its peremptory challenges to guarantee an all white jury. After hearing six weeks of testimony, the jury took only two and a half hours to return a n guilty verdict. *Ibid.* In the ensuing riot:

> "Blacks ran through the streets chanting 'McDuffie! McDuffie!' and 'Where is justice for the black man in America?' Cars were overturned at the state building. More whites were beaten. The verdict had hit the tense community like gasoline on a flame because it was perceived as an all-white cover-up. In the end the riots left sixteen dead, several hundred injured, and approximately $100 million in damages." *Id.* at 179- 80.

The McDuffie case illustrates that society has a compelling interest in assuring that all parts of the community can be represented on juries. This means that neither the

defense nor the prosecution should be permitted use peremptory challenges to racially bias the jury.

> "Selection which is or even appears to be discriminatory obviously destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness. This is illustrated in the extreme by the impunity with which racial and civil rights crimes have been committed in the South." Kuhn, *Jury Discrimination: The Next Phase* 41 S.Cal.L.Rev. 235, 246 (1968) (footnote omitted).

Using peremptory challenges makes a jury less representative and more homogenous as each side eliminates those who are thought to be hostile to its interests. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Thus both the prosecution *and* the defense must be prevented from having their assumptions regarding group bias reflected in the final composition of the petit jury if the goals of *Batson* are to be achieved.

The problem of discriminatory peremptory challenges by the defense was recognized in the leading pre-*Batson* peremptory challenge case, *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978). In *Wheeler*, the California Supreme Court recognized that defense peremptory challenges pose a threat similar to those of the prosecution, and therefore indicated in dicta that the defense would be held to the same standard as the prosecution in making peremptory challenges. 22 Cal.3d at 282, n. 29, 583 P.2d at 765. See also *People v. Snow*, 44 Cal.3d 216, 228-29, 746

P.2d 452, 459 (1987) (Eagleson, J. concurring). However, *Wheeler* was based solely on California's state constitutional right to trial by jury, Cal. Const. art. I § 16. *Wheeler*, 22 Cal.3d at 283-87, 583 P.2d at 766-68. Unlike the Sixth Amendment, that provision extends the right of jury trial to the prosecution as well as the defense. See *People v. Terry*, 2 Cal.3d 362, 377, 466 P.2d 961, 968 (1970).

In a proper case, the Court should re-examine the question reserved in *Batson* of "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." 476 U.S. at 89, n. 12. This case, again, is not the case. To keep that door open, the Court should continue to recognize the Fourteenth Amendment and the statutes enacted under it as the primary protection against this kind of discrimination. The Sixth Amendment, with its one-sided operation, is not equal to the task.[5]

3. Impracticality

In addition to the other problems with extending the Sixth Amendment to covering peremptory challenges, there is also a serious problem with the practicality of making such an extension. The court recognized this problem in *Taylor v. Louisiana*, 419 U.S. 522 (1975), where it refused to extend the Sixth Amendment cross-section guarantees to the actual composition of the petit jury. *Taylor*, 419 U.S. at 538; see *Lockhart v. McCree*, 476 U.S.

5 The Fourteenth Amendment, of course, is limited to actions of states against people. Victims are people; defense lawyers are officers of the court and hence of the state. Furthermore, the court's enforcement of a racist defense challenge is state action. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

162, 173-74 (1986). We understand that this topic will be covered at length in respondent's brief.

C. Any rule which would not be retroactive on habeas corpus cannot be initially made on habeas corpus.

The Fourteenth Amendment rule established in *Batson v. Kentucky*, 476 U.S. 79 (1986) is not applicable to the present habeas corpus petition under either the *Linkletter-Stovall* approach, *Allen v. Hardy*, 478 U.S. 255 (1986), or the Harlan-Powell approach, see part A.3, pp. 8-12, above. Petitioner seeks to avoid the nonretroactivity bar by establishing a new rule, substantially the same as the *Batson* rule as far as this case is concerned, under the Sixth Amendment. This attempt raises the issue of the effect of the uniformity principle on the making of new rules on habeas corpus. See, *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 664-65, 107 S.Ct. 708, 718-19 (1987) (White, J. dissenting). We submit that the uniformity principle embraced by *Griffith* precludes the making of new rules on habeas corpus, except in those rare cases where the rules made would be retroactive.

In reaching the conclusion that new rules established on direct review must apply to all other cases on direct review, this Court recognized as controlling two fundamental principles of the adjudication process. First, this Court only adjudicates "cases" and "controversies." *Griffith*, 93 L.Ed.2d at 658, 107 S.Ct. at 713. A conviction can be reversed only because the applicable law requires that it be reversed. The integrity of judicial review requires the same result in all cases where the same law is applicable. *Ibid.* Second, if a different rule is to apply to another case, fairness requires that there be some principled difference in the facts or posture of the case to justify the difference. Similarly situated

defendants must be treated the same. *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting). While some may disagree with this approach, see *Shea v. Louisiana*, 470 U.S. 51, 62-63 (White, J., dissenting), it has been embraced by the Court and is now firmly established precedent.

Nothing in the distinction between direct review and habeas corpus justifies abandoning these principles merely because a case is on collateral review. When a habeas petitioner proposes a new rule, that rule must apply to all similarly situated petitioners or to none. When legislatures seek to classify people, the Constitution requires them to have a rational basis for doing so. See L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). The judicial branch can hardly declare itself exempt from this basic requirement.

The rule which petitioner proposes would not be retroactive on habeas under either view of retroactivity, just as *Batson* is not. The extension of the Sixth Amendment fair cross-section requirement to the petit jury requires a flat overruling of *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) and would be a "clear break" under the traditional view, "virtually compell[ing] a finding of nonretroactivity." *United States v. Johnson*, 457 U.S. 537, 549-50 (1982).

For the same reasons as *Batson*, the proposed rule qualifies for none of the Harlan view's narrow exceptions to its nearly *per se* rule of nonretroactivity on habeas. See part A.4, pp. 12-14, above. Regardless of whether petitioner's proposed rule is adopted, his petition would be "judged according to the constitutional standards existing at the time of conviction," *Griffith*, 93 L.Ed.2d at 662, 107 S.Ct. at 717 (Powell, J., concurring). Any discussion of a

new standard, therefore, would be pure dictum. If the Court were to announce a standard which does not apply to the case before it, it would be legislating, not adjudicating. *Desist*, 394 U.S. at 259.

Whether the rule in effect at the time of the state proceedings was a correct rule is a moot question in every federal habeas proceeding. The writ does not lie, in the Harlan view, to redress a "violation" of a rule not existing at the time.

The dilemma pointed out by Justice White in *Griffith*, 93 L.Ed.2d at 664-65, 107 S.Ct. at 718-19, vanishes when the Harlan view is fully accepted and properly applied. The tail will not wag the dog by forcing application to all habeas petitions of new rules made on habeas. Cf. *Ibid.* New rules simply cannot be made on habeas unless they independently qualify for retroactivity.

Conclusion

The judgment of the Seventh Circuit should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation